

ESTTA Tracking number: **ESTTA324717**

Filing date: **12/30/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

|                           |   |
|---------------------------|---|
| Proceeding                | 92051579  |
| Party                     | Defendant<br>Commercial Furniture Group, Inc. (by merger with Howe Furniture Corporation)   |
| Correspondence<br>Address | Daniel T. Batten<br>Greensfelder, Hemker & Gale, P.C.<br>10 South Broadway, Suite 200<br>St. Louis, MO 63102<br>UNITED STATES<br>dtb@greensfelder.com |
| Submission                | Motion to Extend  |
| Filer's Name              | Daniel T. Batten  |
| Filer's e-mail            | dtb@greensfelder.com, jlr@greensfelder.com  |
| Signature                 | /Daniel T. Batten/  |
| Date                      | 12/30/2009  |
| Attachments               | DiffrientMotionLeaveAnswer12-30-09.pdf ( 3 pages )(12338 bytes )  |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

|                            |   |                           |
|----------------------------|---|---------------------------|
| HUMANSIZE CORPORATION      | ) | Cancellation No. 92051579 |
|                            | ) |                           |
| Petitioner,                | ) | Trademark: DIFFRIENT      |
|                            | ) |                           |
| v.                         | ) | Reg. No.: 1,632,391       |
|                            | ) |                           |
| HOWE FURNITURE CORPORATION | ) |                           |
|                            | ) |                           |
| Respondent.                | ) |                           |
| _____                      | ) |                           |

**MOTION FOR LEAVE TO FILE OUT OF TIME**

COMES NOW Respondent Commercial Furniture Group, Inc. (“Commercial Furniture”), by and through the undersigned counsel, and, respectfully requests leave from the Trademark Trial and Appeal Board (the “Board”) to file its response to the Petition for Cancellation out of time, which is submitted concurrently herewith. In support of this motion, Commercial Furniture states as follows:

Pursuant to Fed. R. Civ. P. 55(c) and TBMP § 312, a default judgment for failure to respond may be granted unless the respondent establishes good cause for its failure to timely respond. Good cause is established if “the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action.” TBMP §312.02. Further, “[t]he determination of whether default judgment should be entered against a party lies within the sound discretion of the Board” and “[i]n exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide the cases on their merits.” *Id.* “Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant.” *Id.* The Board has recognized that a delay of nine (9) days due to inadvertence on the part of a defendant’s counsel, accompanied by a submission of a response that is not frivolous, is sufficient to show good cause for

the failure to respond. Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc., 21 U.S.P.Q.2d 1556 (TTAB 1991).

The response to the Petition was due December 29, 2009. Due to an error in connection with Commercial Furniture's counsel's docketing and the interruption of the holiday season, the due date was inadvertently missed. However, the response, a Motion to Dismiss, which clearly shows that it has a meritorious defense to the action, is concurrently submitted herewith (one (1) day after the due date). There is otherwise no evidence that the Petitioner will be prejudiced by this one day delay. Therefore, Commercial Furniture respectfully requests that the Board grant it leave to file its Motion to Dismiss out of time, to enter the Motion, and grant such other and further relief as it deems just and proper.

WHEREFORE, Respondent Commercial Furniture prays that the Board (i) enter an order granting Commercial Furniture leave to file its response to the Petition out of time, (ii) enter the concurrently submitted Motion to Dismiss as Commercial Furniture's timely response to the Petition, and (iii) grant such other and further relief as it deems just and proper.

Dated: December 30, 2009

Respectfully submitted,

/s/ Jason L. Ross

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*Attorneys for Respondent Commercial Furniture  
Group, Inc.*

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the above and foregoing Motion for Leave to File Out of Time was submitted to the Trademark Trial and Appeal Board electronically via the Internet on December 30, 2009, and was mailed via the United States Postal Service, with postage prepaid, on December 30, 2009, to the following:

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